(3)
FILED
JUL 14 1993
OFFICE OF THE CLERK

No. 92-1888

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CONSTRUCCIONES AERONAUTICAS, S.A.,
a Foreign Corporation,

Petitioner,

- v. -

DIERDRE M. SHERER, Administratrix of the Estate of
David W. Sherer, deceased,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF

THOMAS J. WHALEN, ESQ.
Counsel of Record
CONDON & FORSYTH
1100 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 289-0500

STEPHEN R. STEGICH III, ESQ.
CONDON & FORSYTH
1251 Avenue of the Americas
New York, New York 10020

Attorneys for Petitioner
Construcciones Aeronauticas, S.A.

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I There is a Genuine Conflict Among the Sixth, Second and Ninth Circuits on the Issue for Review	1
II The Issue for Review is Whether the Requirements for Jurisdiction Over a Sovereign Established by Congress should be Strictly Adhered to in the Case of a Foreign Sovereign as is Currently the Case for the United States	4
CONCLUSION	7

TABLE OF AUTHORITIES

CASES	Page
Gerritsen v. Consulado General de Mexico, 989 F.2d 340 (9th Cir. 1993)	2,4
Gray v. Permanent Mission of the People's Republic of the Congo to the United Nations, 443 F. Supp. 816 (S.D.N.Y.), *aff'd*, 580 F.2d 1044 (2d Cir. 1978)	3,4
McNeil v. United States, 124 L.Ed.2d 21 (1993)	5,6
Obenchain Corp. v. Corporation Nacionale de Inversiones, 656 F. Supp. 435 (W.D. Pa. 1987), *aff'd in part and order vacated in part*, 898 F.2d 142 (3d Cir. 1990)	2
STATUTES	
Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1391(f), 1441 and 1602 *et seq.* 1988)	2
28 U.S.C. § 1603(b)	1
Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.*	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1888

CONSTRUCCIONES AERONAUTICAS, S.A.,
a Foreign Corporation,

Petitioner,

- v. -

DIERDRE M. SHERER, Administratrix of the Estate of
David W. Sherer, deceased,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

---

REPLY BRIEF

I

There is a Genuine Conflict Among the Sixth, Second and Ninth Circuits on the Issue for Review

The Petition[1] for a Writ of Certiorari presents the issue whether "substantial compliance" or "strict

---

[1] Petitioner Construcciones Aeronauticas, S.A. ("CASA"), the defendant in the district court, is an "agency or instrumentality of a foreign state" within the meaning of 28 U.S.C. § 1603(b) (1988).

compliance" with the procedures established by Congress is required to obtain *in personam* jurisdiction over a foreign state under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1332, 1391(f), 1441 and 1602 *et seq.* (1988).

Respondent opposes CASA's Petition because she contends that there is no conflict among the circuits and that the various decisions of the circuits and the district courts on this issue can be reconciled factually on two points. First, the courts which followed the substantial compliance rule did so because the defendant had actual notice of the lawsuit. Secondly, the courts which followed the strict compliance rule and found lack of effective service of process permitted the plaintiff the opportunity to re-serve the foreign state, without dismissing the action.

These attempted factual distinctions merely highlight the fact that there is a difference of opinion in the circuit courts, recognized by the Sixth Circuit in this case and the district court in *Obenchain Corp. v. Corporation Nacionale de Inversiones*, 656 F. Supp. 435 (W.D. Pa. 1987), *aff'd in part and order vacated in part*, 898 F.2d 142 (3d Cir. 1990), regarding whether strict compliance or substantial compliance is required under the FSIA.

The conflict among the circuits became more pronounced in 1993, as the Ninth Circuit joined the Second Circuit in requiring strict compliance with the service of process provisions of the FSIA. In *Gerritsen v. Consulado General de Mexico*, 989 F.2d 340 (9th Cir. 1993), the Ninth Circuit upheld the dismissal of a complaint against the Mexican Consulate as a "foreign state" because the plaintiff, as in the present

case, failed to send, through the clerk of the court, a translation of the complaint to the foreign state.

Furthermore, contrary to respondent's argument, there is in fact evidence in the opinion in *Gray v. Permanent Mission of the People's Republic of the Congo to the United Nations*, 443 F. Supp. 816 (S.D.N.Y.), *aff'd*, 580 F.2d 1044 (2d Cir. 1978), that the Congo Mission received "actual notice." The court there stated: "[t]he defendant [probably the word "plaintiff" was intended] argues that the Congo Mission had a clear understanding of the legal situation and was given ample notice of the action against it." *Gray*, 443 F. Supp. at 820-21. However, the court added:

> [w]hether this be true or not, informal notification through channels clearly outside the obvious requirements of the applicable statute cannot be substituted for those which meet the requirements.

Gray, 443 F. Supp. at 821.

In support of her contention that the Congo Mission did not receive "actual notice" in *Gray*, respondent quotes a later paragraph of the opinion that "[i]t is obvious that the officials of the Congo Mission did not understand their rights under American law. . . ." *Id.* In the context of the opinion, however, the court in that paragraph obviously is referring to the reason why the Congo Mission did not timely remove the action rather than to any lack of actual notice.

Respondent writes on page 11 of her Brief:

> Defendant contends that there "should be only one position in the United States on the

> issue of whether strict or substantial compliance is required for effective service under the FSIA". (Petition at 18). In point of fact, there is only one such position; where actual notice of the lawsuit is received and substantial compliance with the Act is achieved, a technical deficiency in service will not defeat a cause of action.

Respondent's Brief at 11.

The decisions in *Gray* and *Gerritsen*, in contrast with the Sixth Circuit's decision in the case at bar, establish that this statement is not correct. Actual notice, or the lack thereof, was not a factor in the dismissals in the *Gray* and *Gerritsen* cases. Rather, there was simply a failure on the part of the plaintiff to comply with the service provisions of the FSIA and the courts in *Gray* and *Gerritsen* decided they were bound to enforce the service procedures established by Congress. In *Gray*, the Court also stated that notification (actual notice) is not a substitute for compliance with the statute.

II

The Issue for Review is Whether the Requirements for Jurisdiction Over a Sovereign Established by Congress should be Strictly Adhered to in the Case of a Foreign Sovereign as is Currently the Case for the United States

The issue for review is fundamentally one of statutory construction: whether the precise and unambiguous service provisions of the FSIA should be given a plain meaning construction, or whether substantial compliance with the statute is all that is required when the foreign sovereign receives "actual notice" of a lawsuit.

Does the fact that the defendant foreign sovereign received "actual notice" relieve the plaintiff of proper service? Must the foreign sovereign appear and contest the service or can it rely upon the courts of the United States to enforce the service requirements Congress has established?

Respondent attempts to trivialize the issue as a "procedural technicalit[y]" or a "triumph of procedure over substance". The Court in *McNeil v. United States*, 124 L.Ed.2d 21 (1993) unanimously found nothing trivial about petitioner's failure in that case to comply with the procedural requirements established by Congress in the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671 *et seq.*: namely, that administrative remedies, which are jurisdictional prerequisites to suit, must be exhausted prior to the institution of any lawsuit against the United States. The Court accepted the *McNeil* case for review because of a conflict in the circuits on the very issue of the significance of jurisdictional prerequisites to suit under a statute waiving sovereign immunity, namely, the FTCA.

The Seventh Circuit had upheld the plain meaning of the statute that suits against the United States must be instituted within six months of an administrative denial. The court held that this requirement was not satisfied where a suit was commenced before the administrative denial. This Court stated in *McNeil*:

> Because decisions in other Circuits permit a prematurely filed FTCA action to proceed if no substantial progress has taken place in the litigation before the administrative remedies are exhausted . . ., we granted certiorari to resolve the conflict.

McNeil, 124 L.Ed.2d at 27 (citations omitted).

The gloss which the circuits had placed upon the institution of suit under the FTCA is similar to the gloss of "actual notice" and "substantial compliance" the Sixth Circuit placed upon the service provisions of the FSIA. In *McNeil*, the Court rejected such construction because the statute was unambiguous. The Court stated: "We are not free to rewrite the statutory text." *Id.*

> The interest in orderly administration of this body of litigation [FTCA litigation] is best served by adherence to the straightforward statutory command.

McNeil, 124 L.Ed.2d at 28.

> As we have noted before, 'in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."

McNeil, 124 L.Ed.2d at 29, (quoting *Mahasco Corp. v. Silver*, 447 U.S. 807 (1980)).

Strict compliance with the administrative procedures of the FTCA is required to obtain jurisdiction over the United States under the FTCA. Are foreign sovereigns to be treated any differently? Modelled in part upon the FTCA, the FSIA, to some extent, was enacted to put foreign sovereigns on the same footing as the United States, namely, sovereigns may be sued in United States courts, but only if the jurisdictional prerequisites to suit are strictly complied with.

Unlike the Second and Ninth Circuits which adhered to clear and unambiguous statutory service re-

quirements of the FSIA, the Sixth Circuit in the case at bar, as well as the Third and Eleventh Circuits, found substantial compliance sufficient, when the foreign state had received actual notice of the pending suit. There is, therefore, a clear and current conflict among the circuits on the issue whether strict compliance or substantial compliance with the service provisions of the FSIA is required to effect *in personam* jurisdiction over a foreign state.

CONCLUSION

For the reasons set forth herein, and in the Petition, petitioner prays that its petition for writ of certiorari be granted.

Respectfully submitted

THOMAS J. WHALEN, ESQ.
Counsel of Record
CONDON & FORSYTH
1100 Fifteenth Street, N.W.
Washington, D.C. 20005

and

STEPHEN R. STEGICH III, ESQ.
CONDON & FORSYTH
1251 Avenue of the Americas
New York, New York 10020

Attorneys for Petitioner
Construcciones Aeronauticas, S.A.

Of Counsel:

PETER F. TAMIGI, ESQ.
EVELYN D. SAHR, ESQ.
BAKER & HOSTETLER
RICHARD BAMBERGER, ESQ.
JOHN WITRI, ESQ.